DINESH KANAVAJI KANAWAGI & ANOR v. VIRGIN PROPERTIES SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
NALLINI PATHMANATHAN JCA
HARMINDAR SINGH DHALIWAL J
[CIVIL APPEAL NO: W-02(NCC)(A)-1498-09-2014]
8 MARCH 2016

COMPANY LAW: *Directors – Offences by directors – Application for validation order under s. 355 of Companies Act 1965 – Whether court empowered to make validation order – Whether alleged omission, defect or irregularity identified – Whether validation order could only be made if breach disclosed and conceded to – Whether s. 355 applicable*

COMPANY LAW: *Directors – Offences by directors – Prosecution pursuant to s. 132(2)(c) of Companies Act 1965 – Prosecution yet to commence – Application for relief under ss. 354 and 355 of Companies Act – Whether s. 354(1) applicable – Whether 'any proceedings' in s. 354(1) may include criminal proceedings – Whether 'liability' connotes civil liability – Whether s. 354 applies to criminal proceedings – Whether relief under s. 354 may tantamount to encroaching on prosecutorial discretion by Attorney-General – Federal Constitution, art. 145*

STATUTORY INTERPRETATION: *Companies Act 1965 – Sections 354 & 355 – Interpretation and scope – Whether wide enough to provide relief against proceedings under Companies Act including criminal proceedings – Intention of Parliament – Whether statutory interpretation of s. 354 give rise to two or more interpretations – Whether there is ambiguity – Interpretation Acts 1948 and 1967, s. 17A*

WORDS & PHRASES: *'any proceedings' – Companies Act 1965 – Section 354(1) – Whether includes criminal proceedings*

The appeal was primarily concerned with the interpretation and scope of ss. 354 and 355 of the Companies Act 1965 ('CA'). The appellants were the directors and shareholders of the first respondent's company. Pursuant to a resolution prepared by the company secretary, as per the appellants' instructions, the authorised share capital of the first respondent was increased from RM100,000 to RM10,000,000 and pursuant to the authority given to them, the appellants issued 7,000,000 shares. The appellants and the first respondent proceeded to file the company Form 24 as required by the CA. However, following a complaint regarding the actions and conduct of the appellants in their capacity as directors of the first respondent, an investigation was carried out by the second respondent, the Companies Commission of Malaysia. Upon completion of the investigations by the second respondent and upon scrutinising the investigation papers, the Public Prosecutor gave the consent to initiate a prosecution against the appellants

pursuant to s. 132(2)(c) of the CA. Representations were made to review any possible charge against the appellants. However, the second respondent insisted that ss. 354 and 355 of the CA are not applicable to criminal proceedings where the prosecution of offences is involved. The appellants took the position that the threat to bring the charge against them was absurd and a non-starter as they had the consent of the general body and did not cause any detriment to the first respondent company. Therefore, they filed an action under ss. 354 and 355 of the CA for declarations, *inter alia*: (i) that the appellants as the directors and shareholders of the first respondent did not use their position to gain benefit or to cause prejudice to the first respondent in the lodgement of the Form 24; (ii) the appellants did not breach any provision of the CA in the lodgement of the Form 24; and (iii) that the second respondent be restrained or prohibited from instituting any action or interfering with the court's jurisdiction in granting appropriate relief in relation to the lodgement of the Form 24. The appellants' application was dismissed by the High Court finding that s. 354 of the CA applies only to civil proceedings and has no application to criminal proceedings. Hence, the appeal which raised the question of law as to whether ss. 354 and 355 of the CA are wide enough to provide relief to the appellants against any proceedings under the CA including criminal proceedings.

Held (dismissing appeal)
Per Harmindar Singh Dhaliwal J delivering the judgment of the court:

(1) Section 355 indicates that power is given to the court to make a validating order in respect of any omission, defect or irregularity in the management or administration of a company under the CA. However, before s. 355 of the CA can be invoked, it is essential to identify the omission, defect or irregularity which is alleged to have occurred in the management or administration of the company. The appellants, in seeking the validation of the court of their actions in respect to the Form 24, had not particularised or conceded to any breach as such. Only when a breach is disclosed and conceded will the court be in a position to determine if any such validation can be ordered. The court was also in no position to determine if the breach was one that could constitute an omission, error or irregularity as envisioned by s. 355 as the breach had not been particularised and conceded. Hence, s. 355 was not applicable. (paras 18, 19, 22 & 23)

(2) The intention of the appellants was to seek relief against their prosecution pursuant to an offence under s. 132(2)(c) of the CA. Since the proceedings have yet to commence, s. 354(1) had no application as it envisages a situation where proceedings have begun. Taken by itself, the words 'any proceedings' in s. 354(1) may include criminal proceedings as the subsequent words 'default' and 'breach' may also include infringement of some penal provision. However, the words 'the court may relieve him either wholly or partly from his liability on such

terms as the court thinks fit' do not support a criminal proceedings as it is inconceivable how a court can relieve someone partly of a criminal charge. The use of the word 'liability' must also connote civil liability. (para 25)

(3) In any event, s. 354(1) and (2) of the CA must be taken together to determine if they include relief from criminal proceedings. It could not have been intended for each sub-section to operate differently for, if that was the case, it would have been explicitly made clear. Section 354(2) operates differently from s. 354(1) in that the relief may be provided by the court where some action is apprehended and not yet taken. However, the word 'claim' in sub-s. (2) limits the subsequent word 'negligence, default, breach of duty or breach of trust'. The word 'claim' cannot refer to criminal prosecution and would confine the words 'any proceeding' in sub-s. (1) to civil proceeding. In the premises, on a plain reading of s. 354 of the CA, it could not apply to criminal proceedings. (paras 26 & 27)

(4) Under art. 145 of the Federal Constitution, the Attorney-General ('AG') has sole or exclusive discretion, although not absolute or unfettered discretion, to institute, conduct or discontinue proceedings. Therefore, any relief provided by the court under s. 354 of the CA may tantamount to encroaching on the prosecutorial discretion by the AG who is also by law the Public Prosecutor by virtue of s. 376 of the Criminal Procedure Code. It cannot have been the intention of the framers of s. 354 to impinge upon the prosecutorial discretion as that would lead to serious questions of unconstitutionality. Further, if the Legislature had intended for s. 354 to apply to criminal proceedings, it would have done so in clearer and more explicit terms. (paras 29-31)

(5) The statutory interpretation of s. 354 did not give rise to two or more interpretations. There is no ambiguity and if there is any inaction to include relief for criminal liability, the language used would have been clearer and emphatic. Thus, s. 17A of the Interpretation Acts 1948 and 1967 need not be resorted to. (paras 32 & 34)

Bahasa Malaysia *Headnotes*

Rayuan ini adalah berkenaan tafsiran dan ruang lingkup ss. 354 dan 355 Akta Syarikat 1965 ('AS'). Perayu-perayu adalah pengarah-pengarah dan pemegang saham syarikat responden pertama. Menurut resolusi oleh setiausaha syarikat atas arahan perayu-perayu, modal saham dibenar milik responden pertama dinaikkan daripada RM10,000 kepada RM100,000,000 dan menurut kuasa yang diberikan kepada mereka, perayu-perayu menerbitkan 7,000,000 saham. Perayu-perayu dan responden pertama meneruskan dengan memfailkan Borang 24 seperti yang dikehendaki oleh AS. Walau bagaimanapun, berikutan aduan tentang tindakan dan kelakuan perayu-perayu dalam kapasiti mereka sebagai pengarah responden pertama, siasatan

dijalankan oleh responden kedua, Suruhanjaya Syarikat Malaysia. Selesai siasatan oleh responden kedua dan setelah meneliti kertas siasatan, Pendakwa Raya memberikan kebenaran memulakan pendakwaan terhadap perayu-perayu di bawah s. 132(2)(c) AS. Rujukan dibuat bagi semakan semula apa-apa pertuduhan terhadap perayu-perayu. Walau bagaimanapun, responden kedua menegaskan bahawa ss. 354 dan 355 Akta Syarikat tidak boleh diguna pakai dalam prosiding jenayah yang melibatkan pendakwaan bagi kesalahan. Perayu-perayu menyatakan bahawa ancaman pertuduhan terhadap mereka tidak masuk akal dan tidak sepatutnya dimulakan kerana mereka mempunyai persetujuan badan umum dan tidak menyebabkan apa-apa kerugian kepada syarikat responden pertama. Oleh itu, perayu-perayu memfailkan tindakan di bawah ss. 354 dan 355 AS untuk pengisytiharan, antara lain: (i) bahawa perayu-perayu sebagai pengarah-pengarah dan pemegang saham responden pertama tidak menggunakan kedudukan mereka untuk mendapat faedah atau menyebabkan prejudis kepada responden pertama dalam penyerahsimpanan Borang 24; (ii) perayu-perayu tidak melanggar mana-mana peruntukan AS dalam penyerahsimpanan Borang 24; dan (iii) bahawa responden kedua dihalang atau dilarang daripada memulakan sebarang tindakan atau campur tangan dalam bidang kuasa mahkamah dalam memberikan relif bersesuaian berhubung penyerahsimpanan Borang 24. Permohonan perayu-perayu ditolak oleh Mahkamah Tinggi yang mendapati bahawa s. 354 AS hanya terpakai pada prosiding sivil dan tidak pada prosiding jenayah. Oleh itu, rayuan ini yang menimbulkan persoalan undang-undang sama ada ss. 354 dan 355 AS cukup luas untuk memberi relif kepada perayu-perayu terhadap mana-mana prosiding di bawah AS termasuk prosiding jenayah.

Diputuskan (menolak rayuan)

Oleh Harmindar Singh Dhaliwal H menyampaikan penghakiman mahkamah:

(1) Seksyen 355 menunjukkan bahawa kuasa diberikan kepada mahkamah untuk membuat perintah pengesahan berkenaan apa-apa kegagalan, kecacatan atau salah aturan dalam pengurusan atau pentadbiran syarikat di bawah AS. Walau bagaimanapun, sebelum s. 355 AS boleh diguna pakai, penting untuk mengenal pasti apa-apa kegagalan, kecacatan atau salah aturan yang didakwa berlaku dalam pengurusan atau pentadbiran syarikat. Perayu-perayu, dalam permohonan untuk pengesahan mahkamah terhadap tindakan mereka berkenaan dengan Borang 24, tidak memperihalkan atau mengakui apa-apa pelanggaran sedemikian. Hanya apabila pelanggaran didedahkan dan diakui, mahkamah boleh menentukan sama ada apa-apa pengesahan boleh dilakukan. Mahkamah juga tidak berada dalam kedudukan untuk menentukan sama ada pelanggaran itu adalah sesuatu yang boleh membentuk peninggalan, ralat atau salah aturan seperti yang termaktub dalam s. 355 kerana pelanggaran itu tidak diperihalkan dan diperakui. Oleh itu, s. 355 tidak terpakai.

(2) Niat perayu-perayu adalah untuk mendapatkan ganti rugi terhadap pendakwaan mereka selaras dengan kesalahan di bawah s. 132(2)(c) AS. Oleh kerana prosiding masih belum bermula, s. 354(1) tidak terpakai kerana ia membayangkan situasi di mana prosiding telah bermula. Dengan itu, perkataan 'any proceedings' dalam s. 354(1) boleh merangkumi prosiding jenayah kerana perkataan terkemudian iaitu 'default' dan 'breach' merangkumi pelanggaran peruntukan jenayah. Walau bagaimanapun, perkataan 'the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit' tidak menyokong prosiding jenayah kerana mustahil bagi mahkamah mengurangkan sebahagian pertuduhan jenayah. Penggunaan perkataan 'liability' juga mempunyai tanggungan sivil.

(3) Walau bagaimanapun, s. 354(1) dan (2) AS perlu dibaca bersama-sama untuk menentukan sama ada ia merangkumi relif daripada prosiding jenayah. Ia tidak mungkin diniatkan bagi setiap subseksyen beroperasi secara berbeza, kerana jika itu yang dihasratkan, maka ia akan diperuntukkan dengan jelas. Seksyen 354(2) beroperasi secara berbeza daripada s. 354(1) di mana relif itu boleh diperuntukkan oleh mahkamah di mana sesuatu tindakan ditanggap tetapi belum diambil. Walau bagaimanapun, perkataan 'claim' dalam sub-s. (2) mengehadkan perkataan berikutnya iaitu 'negligence, default, breach of duty or breach of trust'. Perkataan 'claim' tidak boleh merujuk kepada pendakwaan jenayah dan akan mengehadkan perkataan 'any proceedings' dalam sub-s. (1) kepada prosiding sivil. Dalam keadan tersebut, bacaan biasa s. 354 AS tidak boleh terpakai bagi prosiding jenayah.

(4) Di bawah per. 145 Perlembagaan Persekutuan, Peguam Negara ('AG') mempunyai budi bicara tunggal atau eksklusif, walaupun bukan budi bicara mutlak atau tidak terbatas, untuk memulakan, menjalankan atau memberhentikan prosiding. Oleh itu, apa-apa relif yang diberikan mahkamah di bawah s. 354 AS seolah-olah mencerobohi budi bicara pendakwaan oleh AG yang juga mengikut undang-undang adalah Pendakwa Raya menurut s. 376 Kanun Tatacara Jenayah. Bukan niat penggubal s. 354 untuk menjejaskan budi bicara pendakwaan kerana ia membawa kepada persoalan serius ketidakperlembagaan. Lantaran itu jika Badan Perundangan bertujuan bagi s. 354 diguna pakai dalam prosiding jenayah, ia akan berbuat demikian dengan lebih jelas dan syarat-syarat nyata.

(5) Tafsiran statutori s. 354 tidak menimbulkan dua atau lebih tafsiran. Tiada kesamaran dan jika tiada tindakan untuk memasukkan relief bagi liabiliti jenayah, bahasa yang digunakan akan menjadi lebih jelas dan tegas. Oleh itu, s. 17A Akta Tafsiran 1948 dan 1967 tidak perlu diguna pakai.

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24 FC ***(refd)***

Customs and Excise Commissioners v. Hedon Alpha Ltd [1981] 2 All ER 697 ***(refd)***

Lawson v. Mitchell [1975] VR 579 ***(foll)***

Lembaga Minyak Sawit Malaysia v. Arunamari Plantations Sdn Bhd & Ors And Another Appeal [2015] 7 CLJ 149 FC ***(refd)***

Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***

Long Say Ting Daniel v. Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit Pte Ltd, intervener) [2012] SGHC 250

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Re Barry and Staines Linoleum Ltd [1934] Ch 227 ***(refd)***

Re Gilt Edge Safety Glass Ltd [1940] Ch 495 ***(refd)***

Re IDEAGLOBAL.COM Ltd [2000] SGHC 65 ***(foll)***

See Nyuk Fung & Ors v. Pan-Global Equities Bhd [1991] 1 CLJ 452; [1991] 1 CLJ (Rep) 406 SC ***(refd)***

Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors [2015] 3 CLJ 1017 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 132(2)(c), 150, 354(1), (2), 355
Companies Commission of Malaysia Act 2001, ss. 3(1), 17
Criminal Procedure Code, s. 376(1)
Federal Constitution, art. 145
Interpretations Act 1948 and 1967, s. 17A

Companies Act 1961 [Aus], s. 365
Companies Act (Cap 50) [Sing], ss. 163(1), 391
Companies Act 1907 [UK], s. 32
Companies Act 1929 [UK], s. 372
Companies Act 1948 [UK], s. 448
Companies Act 1985 [UK], s. 727
Companies Act 2006 [UK], s. 1127
Companies (Consolidated) Act 1908 [UK], s. 279

For the appellants - Amer Hamzah Arshad; M/s Melissa Ram
For the 1st respondent - Shopna Rani Malakar; M/s Shopna Rani Malakar & Co
For the 2nd respondent - Ku Hayati Ku Haron (Mohamad Zainal Abidin Ahmad with her), SFCs; Suruhanjaya Syarikat Malaysia

[Editor's note: For the High Court judgment, please see Dinesh Kanavaji Kanawagi & Anor v. Virgin Properties Sdn Bhd & Anor [2015] 6 CLJ 1104 (affirmed)]

Reported by S Barathi

JUDGMENT

Harmindar Singh Dhaliwal J:

Introduction

[1] This appeal from the Kuala Lumpur High Court is primarily concerned with the interpretation and scope of ss. 354 and 355 of the Companies Act 1965 ("CA 1965"). The issue which confronted us, and we were informed that it was a novel question of law, was whether the said sections of the CA 1965 are wide enough to provide relief to the appellants against any proceedings under the CA 1965 including criminal proceedings.

[2] The appellants had filed the originating summons ("OS") in the High Court seeking essentially the following orders pursuant to ss. 354 and 355 of the CA 1965:

(a) A declaration that the appellants as directors and shareholders of Virgin Properties Sdn Bhd ("Virgin Properties") did not use their position as directors to gain benefit or to cause prejudice to Virgin Properties in the lodgement of Form 24 of the Companies Act 1965 dated 13 August 2008 which showed that the paid up capital of Virgin Properties as RM7 million;

(b) A declaration that the appellants as directors and shareholders of Virgin Properties did not breach any provision of the Companies Act 1965 in the lodgement of Form 24 of the Companies Act 1965 dated 13 August 2008 which showed the paid up capital of Virgin Properties as RM7 million; and

(c) That the second respondent *vide* itself, employees, agents or in whatever form be restrained or prohibited from instituting any action or interfering with the court's jurisdiction in granting appropriate relief in relation to the lodgement of Form 24 of the Companies Act 1965 dated 13 August 2008 which showed the paid up capital of Virgin Properties as RM7 million.

[3] The OS was however dismissed by the High Court on 25 August 2014 giving rise to this appeal. At the hearing of the appeal on 16 November 2015, and after having read the written submissions as well as hearing oral arguments on the issues raised, we indicated to the parties that we would deliver our decision on a date to be informed. In the meantime, parties were to furnish the court with further research on the prevailing position that obtained in other jurisdictions. Having been apprised of the position, this is now our decision.

The Factual Background

[4] The relevant facts leading to the filing of the OS are well set out by the learned judge and can be summarised as follows. The first respondent is a company incorporated in Malaysia pursuant to the CA 1965. The

A appellants are both directors and shareholders of the first respondent. The second respondent is a corporate regulator established under s. 3(1) of the Companies Commission of Malaysia Act 2001 (Act 614) and entrusted with the statutory functions, *inter alia*, to ensure that the provisions of Act 614 and the laws specified in the First Schedule are administered, enforced, given B effect to, carried out and complied with. It is also tasked with regulating matters relating to corporations and companies to encourage proper conduct amongst directors, secretaries and other officers of a corporation in order to ensure that all corporate and business activities are conducted in accordance with established norms of good corporate governance and to encourage and C promote corporate responsibility and business sustainability (s. 17 of the Act 614).

[5] The appellants/directors intended to increase the paid up capital of the first respondent and instructed the company secretary, Augustine Gregory Dicom, to prepare the necessary documents. The company secretary D prepared a draft of the documents and forwarded the same to the appellants/directors on 24 March 2008.

[6] On 13 August 2008, pursuant to a resolution prepared by the company secretary, the authorised share capital of the first respondent was increased from RM100,000 to RM10,000,000. The appellant's position was that they E were authorised by the general meeting resolution dated 29 February 2008 as follows:

> THAT pursuant to Section 132D of the Companies Act, 1965, the Directors be and are hereby authorised to issue and allot from the unissued capital of the Company such number of shares out of the F unissued capital of the Company to any party of parties upon such terms and conditions and such purposes as the Directors may deem fit.

[7] On the same day, the appellants/directors pursuant to the authority given to them issued 7,000,000 shares as follows:

G Dinesh Kanavaji (1st appellant)	3,430,000
Ku Azahar bin Ku Abdul Razak (2nd appellant)	3,570,000

The appellants and the first respondent filed the company Form 24 dated 13 August 2008 as required by CA 1965 ("the said Form 24").

H **[8]** Thereafter, after some time had lapsed, the second respondent received a complaint on 4 September 2012 regarding the actions and conduct of both appellants in their capacity as directors of the first respondent. Having examined the contents of the complaint, the second respondent commenced an investigation into the matter. The focus of the investigation was on the said Form 24 which was signed by the second appellant and the I first respondent's company secretary, Augustine Gregory Dicom.

[9] According to the said Form 24, the appellants in their capacity as directors of the first respondent had allotted 7,000,000 new shares of RM1 each to themselves with the first appellant allotted 3,430,000 shares and the second respondent allotted 3,570,000 shares. This Form 24 was lodged in the second respondent's office and according to it all the newly allotted shares (7,000,000 unit shares) were paid in cash by both appellants.

[10] The first respondent then *vide* their letter dated 15 May 2013 wrote to the second respondent giving them notice that no irregularity has taken place or if there was, the first respondent would rectify or validate any issues provided the same was informed to them and as is permitted under s. 355 of the CA 1965.

[11] It however transpired that after the second respondent had completed their investigations and upon scrutinising the investigation papers, the Public Prosecutor had given the consent to initiate prosecution against the appellants in the Kuala Lumpur Sessions Court pursuant to s. 132(2)(c) of the CA 1965.

[12] In the meantime, representations were made to review any possible charge against the appellants. The second respondent however insisted that ss. 354 and 355 of the CA 1965 are not applicable to criminal proceedings where the prosecution of offences is involved. The appellants took the position that the threat to bring the charge against them was absurd and a non-starter because the appellants had consent of the general body and did not cause any detriment to the first respondent company as confirmed by the company itself. The appellants then filed the instant action under ss. 354 and 355 of the CA 1965 for declarations as set out earlier. Under a certificate of urgency, the appellants also sought for an injunction to restrain the second respondent from instituting any action in relation to the said Form 24 as alluded to earlier.

Findings Of The High Court

[13] On the question of whether s. 355 of the CA 1965 was relevant to the case at hand, the learned judge noted that s. 355 is concerned with the rectification of irregularities in the management or administration of a company, including the absence of quorum at any of a directors' or company meeting or default in the observance of the memorandum or articles of the company, including the failure to lodge any declaration of solvency. As such, the learned judge came to the conclusion that s. 355 is not applicable in the instant case.

[14] With regard to s. 354 of the CA 1965, the learned judge agreed that the issue at hand is whether 354 is wide enough to provide relief to the appellants against criminal proceedings. After considering the submissions advanced by the parties, the learned judge came to a finding that s. 354 of the CA 1965 applies only to civil proceedings and has no application to criminal proceedings. In coming to this view, the learned judge was heavily

A influenced by the decision of the Singapore High Court in *Re IDEAGLOBAL.COM Ltd* [2000] SGHC 65 and adopted the reasoning and approach in that case. The case of *IDEAGLOBAL* concerned s. 391 of the Companies Act of Singapore (Cap 50) which is in *pari materia* with s. 354 CA 1965.

B **[15]** The learned judge agreed with the contention that if Parliament had intended s. 354 to extend to criminal proceedings, the Legislature would have drafted the provision in clearer and more explicit terms. The learned judge was also concerned that any such extension to criminal proceedings would encroach into the prosecutorial discretion of the Public Prosecutor in C instituting criminal prosecutions thereby giving rise to the constitutionally of such an action.

[16] For good measure, the learned judge also followed what was decided in another Singapore case, *Long Say Ting Daniel v. Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit* D *Pte Ltd, intervener)* [2012] SGHC 250, and held that s. 354 of the CA 1965 operated narrowly to afford relief to directors as against proceedings brought by the company only. Accordingly, it was further held that the appellants cannot be afforded relief as against proceedings brought by the second respondent.

E

Our Decision

[17] It would be convenient to first deal with the issue of whether s. 355 of the CA 1965 is applicable in the instant case. For convenience s. 355 is reproduced as follows:

F 355. Irregularities in proceedings

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.

G (2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

(3) Without affecting the generality of subsections (1) and (2) or of any other provision of this Act, where any omission, defect, error or H irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company I or of the directors thereof or any assemblage purporting to be such as meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to section 257, the Court:

(a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity;

(b) shall, before making any such order, satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;

(c) where any such order is made, may give such ancillary or consequential directions as it thinks fit; and

(d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.

(4) The Court (whether the company is in process of being wound up or not) may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms, if any, as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.

[18] A plain reading of s. 355 of the CA 1965 indicates that power is given to the court to make a validating order in respect of any omission, defect or irregularity in the management or administration of a company under the CA 1965. The important consideration before the court exercises its discretion is to ensure that any such validation will not result in any injustice to the company or to any member or creditor.

[19] However, what appears to have been overlooked by the parties is that before s. 355 can be invoked, it is essential to identify the omission, defect or irregularity which is alleged to have occurred in the management or administration of the company (*Nyuk Fung & Ors v. Pan Global Equities Bhd* [1991] 1 CLJ 452; [1991] 1 CLJ (Rep) 406; [1991] 1 MLJ 152).

[20] In *See Nyuk Fung*, supra, a Supreme Court decision, a director of the respondent company had applied for relief under ss. 150 and 355 of the CA 1965 whereby an order was sought from the High Court for the respondent company to convene an extraordinary meeting for the purpose of considering and if deemed fit to pass five resolutions in connection with the purchase of five properties. The application was granted. The appellants and others who were minority shareholders applied to intervene and upon leave being granted they applied for the setting aside of the *ex parte* order on the ground that the subject matter of the application is not within the purview of s. 355 of the CA 1965. The learned judge dismissed the intervener's application who then appealed.

[21] In this connection the Supreme Court held, apart from the fact that the reasons given could not constitute an omission, defect or irregularity as required under s. 355 of the CA 1965, that before there can be a basis for rectification or validation by the court, a breach of the Companies Act 1965 must have occurred or a default in the observance of the company's memorandum and articles must have taken place or a company's or director's meeting must have been rendered ineffective. The court observed that no breach of any kind had been particularised and conceded to render the purchase of the five properties void or ineffective.

[22] In the instant application, the appellants are in effect seeking an order that they have not breached any provisions of the CA 1965 in the lodgement of Form 24 or gained any benefit as directors to the prejudice of Virgin Properties. They have not particularised or conceded to any breach as such. What they appear to be telling the court is this – "we are not sure if there was any breach but if there was we would like the court to validate our actions with respect to the said Form 24".

[23] In the premises, and with respect, we do not think that the court is in any position to validate anything. The court would only be able to do so if the breach is ascertained and particularised. In other words, only when a breach is disclosed and conceded will the court be in a position to determine if any such validation can be ordered after considering the justice of the case as required by s. 355 of the CA 1965. In effect, the court is also in no position to determine if the breach is one that can constitute an omission, error or irregularity as envisioned by s. 355 of the CA 1965 as the breach has not been particularised and conceded. We therefore agree that s. 355 of the CA 1965 is not applicable to the circumstances in the present case.

Section 354 Of The Companies Act 1965

[24] We now come to s. 354 of the CA 1965. For convenience, s. 354 is reproduced below:

> 354. Power to grant relief
>
> (1) If in any proceeding for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.
>
> (2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust he may apply to the Court for relief, and the Court shall have the

same power to relieve him as under this section it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought. A

(3) The persons to whom this section applies are:

(a) officers of a corporation; B

(b) persons employed by a corporation as auditors, whether they are or are not officers of the corporation;

(c) experts within the meaning of this Act; and

(d) any persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other persons so appointed or so directed. C

[25] The intention of the appellants here is to seek relief against their prosecution pursuant to an offence under s. 132(2)(c) of the CA 1965. Since D such proceedings have yet to commence, s. 354(1) has no application as it envisages a situation where proceedings have begun. Taken by itself, the words "any proceeding" in s. 354(1) may include criminal proceedings as the subsequent words "default" and "breach" may also include infringement of some penal provision. The difficulty here is that the words "the court may E relieve him either wholly or partly from his liability on such terms as the court thinks fit" do not support a criminal proceeding as it is quite inconceivable how a court can relieve someone partly of a criminal charge. The use of the word 'liability' then must also connote civil liability.

[26] In any event, it is our view that both s. 354(1) and (2) must be taken F together to determine if they include relief from criminal proceedings. It cannot have been intended for each sub-section to operate differently for if that was the case it would have been explicitly made clear. Sub-section (2) in any event appears to cross refer to sub-section (1) in alluding to the power to relieve under sub-s. (1) with the words "... same power to relieve him as G under this section it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought." Further, the reference to "negligence" clearly excludes criminal proceedings.

[27] Now as alluded to earlier, s. 354(2) operates differently from s. 354(1) H in that relief may be provided by the court where some action is apprehended and not yet taken. This is precisely the position here. However the word "claim" in sub-s. (2) limits the subsequent words "negligence, default, breach of duty or breach of trust". And the word "claim" by any stretch cannot conceivably refer to a criminal prosecution. We are of the view that the word I "claim" in s. 354(2) would also confine the words "any proceeding" in sub-s. (1) to civil proceedings. In the premises, we are constrained to hold that on a plain reading of s. 354 of the CA 1965, it cannot apply to criminal proceedings.

[28] Apart from a plain reading of s. 354 of the CA 1965, there are also other reasons for our view in limiting s. 354 to civil proceedings. Firstly, we note that art. 145 of the Federal Constitution gives a wide discretion to the Attorney-General to institute, conduct or discontinue any proceedings for an offence other than proceedings before the Syariah Court, Native Court or a Court-Martial (*Long Samat & Ors v. PP* [1974] 1 LNS 80; [1974] 2 MLJ 152).

[29] This wide discretion, we would venture to add, means that the Attorney-General under art. 145 of the Federal Constitution has sole or exclusive discretion although not absolute or unfettered discretion to institute, conduct or discontinue proceedings which discretion can be delegated by law (*Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135). We have not overlooked the appellants' challenge of the exercise of such discretion by way of raising allegations of *mala fide* on the part of the second respondent in prosecuting the plaintiffs for reasons which appear in the affidavits. Nevertheless, these allegations only become relevant if s. 354 of the CA 1965 applies to criminal proceedings.

[30] Be that as it may, since the Attorney-General has sole discretion under art. 145 to initiate, conduct or discontinue proceedings, any relief provided by the court under s. 354 of the CA 1965 may tantamount to encroaching on the prosecutorial discretion by the attorney-general who is also by law the Public Prosecutor by virtue of s. 376(1) of the Criminal Procedure Code. It cannot have been the intention of the framers of s. 354 to impinge upon the prosecutorial discretion as that would lead to serious questions of unconstitutionality.

[31] The second reason, as pointed out by the learned judge at the High Court, is that if the Legislature had intended for s. 354 to apply to criminal proceedings, it would have done so in clearer and more explicit terms. The draftsman would have easily foreseen the issue of whether s. 354 ought to extend to criminal proceedings as there are many penal provisions in the CA 1965. The fact that the draftsman did not explicitly refer to criminal proceedings must mean that the intention was to exclude the same. This is not to suggest that the draftsman must provide for every contingency. We must accept that there will be many circumstances when the draftsman is unable to foresee every eventuality which will then create room for different interpretations. However the instant provision is not such a case.

[32] Learned counsel for the appellants also urged the court to have regard to s. 17A of the Interpretation Acts 1948 and 1967 (Act 388) and adopt a construction in accordance with the legislative purpose as intended by Parliament citing the Federal Court cases of *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24; *Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors* [2015] 3 CLJ 1017 and *Lembaga Minyak Sawit Malaysia v. Arunamari Plantations Sdn Bhd & Ors And Another Appeal* [2015] 7 CLJ 149.

[33] In this regard, and on the question of the application of s. 17A of the Interpretation Acts, the Federal Court case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195 is instructive. Speaking for the court, Augustine Paul FCJ observed (at p. 210):

> The choice prescribed in s. 17A of "... a construction that would promote the purpose the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object ..." can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous s. 17A will have no application as the question of another meaning will not arise. Thus, it is only when a provision is capable of bearing two or more different meanings can s. 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation.

[34] As we have stated earlier, the statutory interpretation of s. 354 of the CA did not give rise to two or more interpretations. The plain meaning of the language used in the said provision was not in doubt. There is no ambiguity in our view. As we had observed, if there was any intention to include relief for criminal liability the language used would have been clearer and emphatic. In the event, s. 17A need not be resorted to in the instant case.

[35] Learned counsel for the appellants also fashioned persuasive arguments on the historical background of s. 354 of the CA 1965. He submitted that the court should consider the position in England from which our Companies Act 1965 has its origins. It is no doubt a historical fact that s. 354 of the CA 1965 is based on s. 448 of the English Companies Act 1948. The English provision itself first appeared as s. 32 of UK Companies Act 1907. It then appeared as s. 279 of the English Companies (Consolidated) Act 1908. Section 279 was replaced by s. 372 in the Companies Act 1929 with some changes until it later reappeared as s. 448 of the Companies Act 1948, then as s. 727 of the Companies Act 1985 and presently as s. 1157 of the Companies Act 2006.

[36] In this regard, the earlier English cases of *Re Barry and Staines Linoleum Ltd* [1934] Ch 227 and *Re Gilt Edge Safety Glass Ltd* [1940] Ch 495 and the much later English case of *Customs and Excise Commissioners v. Hedon Alpha Ltd* [1981] 2 All ER 697 ("*Hedon Alpha*") support the proposition that the English provision was designed to also cater for relief from penal consequences apart from civil liability. For example in the *Hedon Alpha* case, *supra*, Ackner LJ in the English Court of Appeal observed (at p. 703):

> That is sufficient to dispose of this appeal, but I accept that the true ambit of s. 448, with one limited exception, is restricted to claims by or on behalf of the company or its liquidator against the officer or auditor for their personal breaches of duty. The only exception relates to the criminal

process for the enforcement of certain specific duties imposed by the 1948 Act on the company's officers, eg the requirement to hold a specified share qualification.

[37] The English position of the relieving provision for criminal liability was however not followed in Australia. The full court of the Supreme Court of Victoria in *Lawson v. Mitchell* [1975] VR 579 declined to follow the older English decisions and held that the relevant Australian provision (s. 365 Companies Act 1961 in *pari materia* with s. 354 CA 1965) did not apply to criminal proceedings. It must be noted that the *Hedon Alpha* case came later in 1981. In *Lawson v. Mitchell*, the Magistrate had found that an offence had been made out against the defendant, a company director, for not causing true and fair accounting records to be kept. The defendant applied for relief pursuant to s. 365 of the Companies Act 1961. The Magistrate granted relief.

[38] Upon review to the Supreme Court, the primary issue for consideration was whether s. 365 of the Companies Act 1961, which enables a court to relieve an officer of a corporation and others from liability for negligence, default, breach of duty or breach of trust where he had acted honestly and reasonably and having regard to the circumstances ought fairly to be excused, has any application to proceedings for an offence under the Act.

[39] The Supreme Court held that s. 365 had no application to criminal liability and must be confined to relief from civil liability. Young CJ and Newton J in a joint judgment observed (at p. 582):

> Notwithstanding the decisions in *Re Barry & Staines Linoleum Ltd*, [1934] Ch. 227; [1933] All E.R. Rep. Ext. 1013, and Re Gilt Edge Safety Glass Ltd., [1940] Ch. 495; [1940] 2 All E.R. 237, to which we later refer, we consider that s. 365 empowers a court to grant relief from civil liability only. We consider that s. 365 has no application to criminal liability, whether upon a summary prosecution in a Magistrates' Court or upon indictment. These conclusions are, in our opinion, supported by a consideration of s. 365 in its present form as a mere matter of statutory interpretation, and we believe that the conclusions are reinforced by a consideration of the history of the provision.

[40] This decision in *Lawson v. Mitchell* was followed by the Singapore High Court in *Re IDEAGLOBAL.COM Ltd* [2000] 3 SLR 100. In this case, the applicant, a Singapore company, paid a dividend to its shareholders believing the dividend would be tax exempt. In order to avoid its shareholders from adverse tax consequences, the company was advised by its legal and tax advisers that such payment could be treated as a loan to the shareholders. However one of the recipient shareholders turned out to be a company owned by one of the directors placing the company and its directors in breach of s. 163(1) of the Companies Act (Cap 50). This provision prohibits loans to director related companies. Fearing criminal prosecution, the applicant

applied for relief under s. 391 of the Companies Act (Cap 50) (in *pari materia* with s. 354 of the CA 1965). The main issue was whether the court had jurisdiction to grant relief under s. 391 from prosecution for an offence.

[41] After a consideration of the English cases as alluded to earlier and the Australian case of *Lawson v. Mitchell*, *supra*, the court held that s. 391 did not apply to criminal proceedings. It was held that if it did apply it would have the practical problem in the operation of the provision as the issue of whether it would encroach into the prosecutorial discretion of the Public Prosecutor and whether such encroachment was unconstitutional would arise. It was further held that the provision would have been drafted in clearer terms if that was the intention.

[42] As we had observed earlier, this Singapore decision was followed by the High Court in the instant case. The learned judge adopted the reasoning and decision of in *Re IDEAGLOBAL.COM Ltd* in coming to her conclusion that s. 354 of the CA 1965 only applied to civil proceedings. Learned counsel for the appellants now says that the learned judge was in error in following this decision and ignoring the English decisions.

[43] In this regard we are mindful of the considerable persuasive value of English decisions. We however note the significant passage of time since the decisions in *Re Barry & Staines Linoleum*, and *Re Gilt Edge Safety Glass* and regret the lack of a full discussion on the scope of the relevant English provision which would have served as a useful guide to the approach to be adopted. The other English case of *Hedon Alpha*, *supra* was not really concerned with the question of whether s. 448 of the 1948 Act applied to all criminal proceedings. The court there was confronted with the question of whether s. 448 of the 1948 Act was wide enough to provide relief against proceedings brought by persons other than the company.

[44] In contrast, the decisions in *Lawson v. Mitchell*, *supra* and *IDEAGLOBAL.COM Ltd*, *supra* are well reasoned and fully consider the scope of the relevant provisions. With respect, we find ourselves in agreement with the views expressed in these cases.

[45] We now come to the final issue. The learned judge appeared to have adopted a narrow construction of s. 354 of the CA 1965 by adopting what was decided in the Singapore case of *Long Say Ting Daniel v. Merukh Nunik Elizabeth*, *supra*. The learned judge agreed with the view that s. 354 of the CA 1965 operated narrowly to afford relief to directors as against proceedings brought by the company only and therefore the plaintiffs cannot be afforded relief as against proceedings brought by the second respondent.

[46] As it turned out, this pronouncement was unnecessary to the decision since it was held that s. 354 of the CA 1965 did not apply to criminal proceedings. In view of our similar finding that s. 354 has no application to criminal proceedings and since we did not have the benefit of full arguments

A on this issue of whether relief to directors under s. 354 of the CA 1965 can only be provided in the case of proceedings brought by the company only, we will decline to offer our opinion at this time. This issue will have to be considered open for decision in some other case at a more opportune time.

Conclusion

B

[47] In the circumstances, and for the reasons stated, we find no appealable error on the part of the learned judge. Accordingly we dismiss the appeal. As the appeal was primarily concerned with an issue of law of some importance in the commercial world, it is appropriate that there be no order as to costs. Order accordingly.

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